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No. 99-709

Supreme Court, U.S.
FILED
NOV 9 1999
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In The

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

DONALD FRANCIS WILLIAMS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the application of a rebuttable presumption in a proceeding under the Pennsylvania Sexual Offender's Act, in which a court must make the factual determination of whether a convicted sex offender qualifies as a Sexually Violent Predator and is therefore subject to a maximum sentence of life imprisonment in excess of any sentence he/she could otherwise lawfully receive, improperly shifts the burden of proof to the offender in violation of his/her right to due process under the Fourteenth Amendment?

Answered in the affirmative by the Pennsylvania Supreme Court.

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OPINION BELOW

The decision of the Pennsylvania Supreme Court is published at *Commonwealth v. Donald Francis Williams*, ___ Pa. ___, 733 A.2d 593 (June 30, 1999). The unpublished opinion of the trial court appears as Appendix A of the Petition For a Writ of Certiorari.

STATEMENT OF JURISDICTION

On September 28, 1999, Joseph P. Conti, Esquire, the District Attorney of Erie County, Pennsylvania, filed a Petition for Writ of Certiorari from the June 30, 1999 decision of the Pennsylvania Supreme Court in *Commonwealth v. Donald Francis Williams*, ___ Pa. ___, 733 A.2d 593 (June 30, 1999), pursuant to Supreme Court Rule 10(c), 28 U.S.C. § 1257(a). The petition was resubmitted and docketed on October 26, 1999. Respondent's Brief in Opposition is filed within thirty days of October 26, 1999, pursuant to Supreme Court Rule 15(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause contained in Section 1 of the Fourteenth Amendment of the United States Constitution states as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

The relevant Pennsylvania statute, contained in Title 42, Subchapter H of the Pennsylvania Consolidated Statutes, entitled "Registration of Sexual Offenders," is attached to the Petition For A Writ Of Certiorari as the first exhibit of the Petitioner.

STATEMENT OF THE CASE

Procedural History

Mr. Williams was arrested and charged by information with two counts of Involuntary Deviate Sexual Intercourse ["IDSI"] as first degree felonies, two counts of Indecent Assault as misdemeanors in the first degree, and one count of Corruption of Minors as a misdemeanor in the first degree. He was tried by a jury on July 15, 1997, and found guilty of all charges. Following Mr. William's conviction, but before the imposition of sentence, Judge Ernest J. DiSantis, Jr., issued an Order directing the State Board to Assess Sexual Offenders (hereinafter "the Board") to perform an assessment of Mr. Williams pursuant to 42 Pa.C.S.A. §§ 9791, et seq. ("Registration of Sexual Offenders") to determine whether he qualified as a Sexually Violent Predator. The judge ordered that the Board submit a report to the court prior to a hearing at which the court would determine whether Mr. Williams was a Sexually Violent Predator.

In response to this order, Mr. Williams filed a Motion for Extraordinary Relief raising numerous constitutional challenges to the applicable provisions of the Registration

of Sexual Offenders Act. Among the claims raised in the motion, Mr. Williams contended that it was a violation of his right to Due Process under the Fourteenth Amendment of the United States Constitution for the Commonwealth to enforce a rebuttable presumption in an adjudicatory proceeding within which a factual determination would be made as to whether he was a Sexually Violent Predator, where one of the consequences of that finding would be the increase of his sentence to a mandatory maximum sentence of life imprisonment, greatly in excess of any sentence he could otherwise lawfully receive for his crimes. Mr. Williams specifically objected that the application of a rebuttable presumption would shift of the burden of proof in the adjudicatory proceeding from the Commonwealth to the defendant.

The trial court granted the motion on September 23, 1997. In an Order and Opinion the trial court concluded that the application of a rebuttable presumption in this proceeding would violate Mr. William's right to due process of law. The trial court refused to impose the enhanced sentence of life under the applicable provisions of "Registration of Sexual Offenders," and instead sentenced Mr. Williams within those ranges that are provided for by the statutes governing the offenses for which Mr. Williams was charged and convicted. On October 22, 1997, the Commonwealth filed an appeal to the Pennsylvania Supreme Court.

On September 16, 1998, the Pennsylvania Supreme Court heard argument on six consolidated cases, including the instant matter, *Commonwealth v. Donald Francis Williams*, No. 84 W.D. Appeal Docket 1997, No. 14 W.D. Appeal Docket 1998. On June 30, 1999, the Pennsylvania

Supreme Court issued an opinion in the present case affirming the decision of the trial court and striking "all of the relevant provisions of the Act pertaining to sexually violent predators." The Pennsylvania Supreme Court found that those provisions were "violative of the procedural due process guarantees of the Fourteenth Amendment." *Commonwealth v. Donald Francis Williams*, ___ Pa. ___, 733 A.2d 593, 608 (June 30, 1999).

On September 28, 1999, Joseph P. Conti, Esquire, the District Attorney of Erie County, Pennsylvania, filed the instant Petition for Writ of Certiorari from the above decision.

The Statute

Pennsylvania's Registration of Sexual Offenders Act, 42 Pa.C.S.A. §§ 9791 to 9799.6, addresses three major classifications: 1) Offenders; 2) Out-of-State Offenders; and 3) Sexually Violent Predators. "Offenders" are persons convicted of enumerated sex offenses that range from first degree misdemeanors to first degree felonies. Under the Act, "Offenders" must register with the state police for a period of ten years. "Out-of-State Offenders" are persons convicted of any of the same range of offenses in another state, who have had the supervision of their parole or probation transferred to Pennsylvania. Under the current version of the statute, this classification of persons is subject to public notification, in addition to the requirement of registration.

"Sexually Violent Predators" are persons convicted of any crime in the above range of offenses that occurred after the passage of the Act, if a court has subsequently

determined that they meet the definition contained in the statute. The most significant consequence of this adjudication is set out in Section 9799.4(a) of the Act, as follows:

> **(a) Increased mandatory maximum sentence.** – Upon the court's finding that the offender is a sexually violent predator, the offender's maximum term of confinement for any offense or conviction specified in section 9793(b) (relating to registration of certain offenders for ten years) shall be increased to the offender's lifetime notwithstanding lesser statutory maximum penalties for these offenses.

In addition, if the individual is ever subsequently paroled,[1] he or she is subject to public notification and lifetime registration.

The definition of "sexually violent predator" is similar to that with which this Court dealt in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 2085 (1997). Under Section 9792 of the Act, the term is defined as follows:

> **"Sexually violent predator."** A person who has been convicted of a sexually violent offense as set forth in section 9793(b) (relating to registration of certain offenders for ten years) and who is determined to be a sexually violent predator under section 9794(e) (relating to designation of sexually violent predators) due to a mental abnormality or personality disorder that

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[1] In Pennsylvania the Parole Board has been given "exclusive power to grant or deny parole to a prisoner." *Rogers v. Board of Probation and Parole*, 555 Pa. 285, 289, 724 A.2d 319, 321 (1997). A prisoner has no right to appellate review from a Parole Board decision denying parole. *Id.* at 292, 724 A.2d at 323.

> makes the person likely to engage in predatory sexually violent offenses.

The definition of "mental abnormality" states:

> **"Mental abnormality."** A congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

The term "personality disorder" is not defined in the statute. The term "predatory", however, is defined as "[a]n act directed at a stranger or at a person with whom a relationship has been established or promoted for the primary purpose of victimization." 42 Pa.C.S.A. § 9792. Finally, a "sexually violent offense" is defined as any offense listed in Subsection 9793(b) of the Act, which includes a selection of sexual offenses ranging from indecent assault as a misdemeanor in the first degree (punishable by a term of two and a half to five years), to rape as a first degree felony (punishable by a term of ten to twenty years), plus the crime of kidnapping a child (except by a parent) and certain crimes involving a minor "relating to [the production of] obscene and other sexual materials and performances."

The adjudicatory procedure established by the Act starts with an assessment and report prepared by a "State Board to Assess Sexually Violent Predators," which consists of "psychiatrists, psychologists and criminal justice experts" appointed by the Governor. 42 Pa.C.S.A. §§ 9794, 9799.3. The Board is guided in its determination by a presumption that the defendant is a "sexually violent

predator," which may be rebutted by clear and convincing evidence, although "[t]he offender does not participate in the assessment proceeding by the Board," *Williams, supra* at 596. The Act declares:

> **(b) Presumption.** – An offender convicted of any offense set forth in section 9793(b) shall be presumed by the board and the court to be a sexually violent predator. This presumption may be rebutted by the offender by clear and convincing evidence at a hearing held in accordance with subsection (e).

42 Pa.C.S.A. § 9794(b). The court hearing referred to in subsection (e) operates as follows:

> **(e) Court review of findings.** – Upon receipt of the board's report, the court shall determine if the offender is a sexually violent predator. This determination shall be made based on evidence presented at a hearing held prior to sentencing and before the trial judge. The offender and district attorney shall be given notice of the hearing and opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses. In addition, the offender shall have the right to counsel and to have a lawyer appointed to represent him if he cannot afford one. After a review of all evidence presented at this hearing, the court may determine whether the presumption arising under subsection (b) has been rebutted and shall set forth this determination on the sentencing order. A copy of the sentencing order containing the determination shall be submitted to the Pennsylvania Board of Probation and Parole and the Department of Corrections.

42 Pa.C.S.A. § 9794(e). Contrary to the suggestion of the Petitioner (*see* Petition for Writ of Certiorari, at 2), there is no requirement in the statute that the report of the Board be "provided to the parties prior to the hearing" or that its members be present – "available to be called as witnesses by either party." *Ibid.*

Once a court has determined that an individual is a Sexually Violent Predator, it has no authority to impose any sentence less than the "increased mandatory maximum sentence" of life described in Subsection 9799.4(a). If the court "refuses to apply this section when it is applicable, the Commonwealth shall have the right to appellate review," and the appellate court must vacate and remand for imposition of the enhanced sentence "in accordance with this section." 42 Pa.C.S.A. § 9799.4(e).

While the Petitioner is correct that all fifty states have enacted sexual offender legislation (*see* Petition for Writ of Certiorari, at 3), the procedures incorporated in the Pennsylvania statute are unique. They appear to be modeled upon statutes prevalent during the post-war years that were struck down in a series of decisions by this and other courts. *See Specht v. Patterson*, 386 U.S. 605, 608, 87 S.Ct. 1209 (1967) (Colorado Sex Offenders' Act); *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 304 (3rd Cir. 1966) (Barr-Walker Act; 19 PS §§ 1166-1174); *Commonwealth v. Dooley*, 209 Pa.Super. 516, 232 A.2d 45 (1967) (Barr-Walker Act).

REASONS FOR OPPOSING THE WRIT

THE PENNSYLVANIA SUPREME COURT HAS INVOKED PRINCIPLES OF LAW REPEATEDLY ARTICULATED BY THIS COURT TO REJECT IN THIS UNIQUE STATUTE THE APPLICATION OF A REBUTTABLE PRESUMPTION IN AN ADJUDICATORY PROCEEDING USED TO DETERMINE FACTS THAT WOULD RESULT IN THE ENHANCEMENT OF PUNISHMENT FAR BEYOND THE STATUTORY MAXIMUMS THAT COULD LAWFULLY BE IMPOSED FOR THE RANGE OF CRIMINAL OFFENSES AT ISSUE HERE.

Petitioner's reasons for requesting appellate review are less than persuasive for two reasons. First, Petitioner persists in presenting an interpretation of the Pennsylvania Registration of Sexual Offenders Act that was rejected by the Pennsylvania Supreme Court. Because it is the prerogative of the Pennsylvania Supreme Court to interpret legislation of the Commonwealth, it is incumbent upon the Petitioner to address the Act as it has been interpreted when presenting its analysis to this Court. Second, as the Pennsylvania Supreme Court has noted in its opinion, Petitioner's position is indefensible even under its own interpretation of the statute. *See Commonwealth v. Donald Francis Williams*, ___ Pa. ___, 733 A.2d 593, 603 (June 30, 1999).

As it did before the Pennsylvania Supreme Court, Petitioner argues that the Pennsylvania Registration of Sexual Offenders Act is a mere sentencing proceeding under which an individual is given the opportunity to mitigate sentence. *See* Petition for Writ of Certiorari, at 8. The Petitioner's argument is belied by its own assertion: "If the legislature merely chose a maximum penalty of

life in prison for these offenses, it could have done so." Petition for Writ of Certiorari, at 6. As the Pennsylvania Supreme Court recognized, and the statute clearly demonstrates, the Legislature did not choose that course. Instead, the Legislature adopted a model incorporated within a series of statutes passed during the post-war years that were later struck down by this and other courts based upon the Due Process Clause of the Fourteenth Amendment. *See Specht v. Patterson*, 386 U.S. 605, 608, 87 S.Ct. 1209 (1967) (Colorado Sex Offenders' Act); *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 304 (3rd Cir. 1966) (Barr-Walker Act; 19 PS §§ 1166-1174); *Commonwealth v. Dooley*, 209 Pa.Super. 516, 232 A.2d 45 (1967) (Barr-Walker Act). At the time that these cases were decided, and repeatedly thereafter, this Court described the scheme promulgated by these statutes as "a separate criminal proceeding" which was "radically different" from a mere sentencing proceeding, and within which a defendant is entitled to the full panoply of due process protections.[2] *See Specht, supra* at 608-09, 87 S.Ct. at 1211-12; *McMillan v. Pennsylvania*, 477 U.S. 79, 89, 106

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[2] In *Specht* this Court explained:

> The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public. . . . That is a new finding of fact that was not an ingredient of the offense charged. The punishment under the second Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm.

386 U.S. at 608-09, 87 S.Ct. at 1211-12 (citation omitted).

S.Ct. 2411, 2418 (1986); *Almendarez-Torres v. United States*, ___ U.S. ___, 118 S.Ct. 1219, 1230 (1998) ("the Colorado defendant in *Specht* was 'confronted with "a radically different situation" from the usual sentencing proceeding,' " quoting *Specht* and *McMillan*).

The Pennsylvania Supreme Court reasonably and correctly categorized Pennsylvania's statute as being like those already found constitutionally lacking, and it appropriately distinguished *McMillan*, upon which Petitioner principally relies. After carefully analyzing the applicable portions of the Registration of Sexual Offenders Act, the Pennsylvania Supreme Court declared:

> Initially, we note that the proceedings whereby one is determined to be a sexually violent predator set forth in the Act are more akin to the provisions found in *Specht* and *Gerchman* than the provisions at issue in *McMillan*. As in *Specht* and *Gerchman*, the determination of whether one is a sexually violent predator is a separate factual question that commences following an offender's conviction of one of the specified offenses found in the Crimes Code.

Williams, 733 A.2d at 601.

The determinative factor that distinguishes a sexually violent predator hearing under this Act from the "mere sentencing proceeding" posited by Petitioner is the fact that persons convicted of the range of predicate offenses listed in Subsection 9793(b) of the Act **cannot** be sentenced to the enhanced term of life imprisonment **unless** they have first been adjudicated to be a Sexually Violent Predator. In *McMillan, supra*, this Court confronted this issue. There the defendant challenged the imposition of a

five year mandatory sentence that was based upon a finding made by a judge at a sentencing hearing that the offender "visibly possessed a firearm" during the course of a robbery. *Id.* at 81. This Court held, by a five to four vote, that due process did not require the state to prove the visible possession of a firearm by a burden or proof greater than "a preponderance of the evidence." Significantly, the Court distinguished the circumstances in *McMillan* from those in *Specht*, stating that the mandatory sentencing statute in *McMillan*,

> . . . neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of a visible possession of a firearm.

McMillan, supra at 87-88, 106 S.Ct. at 2417.[3]

This, however, is precisely what occurs when a person is adjudicated a "Sexually Violent Predator." Indeed, the language of the Legislature is straightforward:

> § 9799.4. Sexually violent predators
>
> **(a) Increased mandatory maximum sentence.** – Upon the court's finding that the offender is a sexually violent predator, the offender's maximum term of confinement for any offense or conviction specified in section

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[3] The significance of this distinction has been repeatedly noted by this Court. *See Witte v. United States*, 515 U.S. 389, 401, 115 S.Ct. 2199, 2207 (1995); *Schad v. Arizona*, 501 U.S. 624, 644 n.9, 111 S.Ct. 2491 (1991).

> 9793(b) (relating to registration of certain offenders for ten years) shall be increased to the offender's lifetime notwithstanding lesser statutory maximum penalties for these offenses.

42 Pa.C.S.A. § 9799.4 (emphasis in original). Those lesser statutory penalties applicable to respondent's offenses range a maximum sentence of five years for a misdemeanor of the first degree, to a maximum sentence of twenty years for a felony of the first degree. 733 A.2d at 602 n.11. The Pennsylvania Supreme Court focused on this issue when it interpreted the Act as establishing something "radically different" from the mere sentencing proceeding that Petitioner continues to urge. *Williams*, 733 A.2d at 602.

Petitioner suggests that the burden of proof at a Sexually Violent Predator hearing can be shifted to the defendant by requiring him to disprove by clear and convincing evidence that he fits the complex definition of a Sexually Violent Predator. However, this assertion is directly contrary to the decisions of this Court that have discussed the issue, starting with *Specht*. Ironically, the language that was used in *Specht* to describe what procedural protections were appropriate for the defendant in that Colorado hearing came from a decision that declared the Barr-Walker Act unconstitutional – the same Pennsylvania statute that served as a model for the current legislation. *See Gerchman, supra*. This Court quoted from *Gerchman* as follows:

> It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to

> a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him.
>
> We agree with that view.

386 U.S. at 610-11, 87 S.Ct. at 1212 (citation omitted), *quoting United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 304 (3rd Cir. 1966).

The "protections" defended by Petitioner are "niggardly" indeed. The rebuttable presumption of Section 9794(b), which requires that a defendant prove that he is not a Sexually Violent Predator by "clear and convincing evidence," is no protection at all. Indeed, although the rebuttable presumption is applied by the assessment board, the accused is deprived of any opportunity to even make rebuttal. Under the statute the accused may not appear before that Board, present evidence, cross-examine witnesses, or argue his case. *See Williams*, 733 A.2d at 596. He is forced to rebut a report with the decks literally stacked against him.

Clearly a rebuttable presumption would not be sufficient "protection" even if it were used in a *Hendricks* type proceeding, where the judge's determination of fact resulted in a lesser deprivation of liberty – an involuntary commitment in a mental health facility. *See Kansas v.*

Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997). In contrast, here the ultimate consequence may be that a defendant is eligible for thirty or forty years of incarceration in a penal institution above and beyond the maximum sentence the defendant would otherwise lawfully receive. The difference between a five year or even a twenty year maximum sentence, and life imprisonment, is difficult to quantify, but easy to understand. It is a significant period of punishment, and a severe deprivation of liberty.

An increased sentence, however, is not the only consequence of an adjudication under the Registration of Sexual Offenders Act. A second consequence is public notification, if the inmate is ever paroled.[4] Once a person has been adjudicated a Sexually Violent Predator, the local police are required to provide written notice of the name, address, photograph and the status of that individual as a "Sexually Violent Predator" to all persons living in his/her neighborhood, and to a wide variety of other recipients. 42 Pa.C.S.A. § 9798. Quoting from a recent decision of the Third Circuit, the Pennsylvania Supreme Court emphasized,

> that notification puts the registrant's livelihood, domestic tranquility, and personal relationships all around him in grave jeopardy. This jeopardy will not only extend to virtually every aspect of the registrant's everyday life, it will also last at least [as long as the notification continues]. As the New Jersey Supreme Court recognized in *Doe [v. Poritz*,142 N.J. 1, 662 A.2d 367 (N.J., 1995)], a registrant thus has a compelling interest in an accurate and reasonable disposition of

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[4] *See* footnote 1, *supra*.

> the issues before the court in a Megan's Law hearing.

Williams, supra at 606, quoting *E.B. v. Verniero,* 119 F.3d 1077, 1107 (3rd Cir. 1997), *cert. denied, Verniero v. W.P.,* 522 U.S. 1110, 118 S.Ct. 1039 (1998).

Thus, even if the Pennsylvania Supreme Court had not interpreted this adjudication as constituting a "separate criminal proceeding," it would have been justified in rejecting the Petitioner's contention that allowing the defendant to rebut the presumption contained in the Registration of Sexual Offenders Act is a Due Process "protection" adequate to safeguard the interest an offender has in not being erroneously subject to public notification and a term of life imprisonment.

In *Verniero,* which involved a civil proceeding that dealt solely with public notification, the Third Circuit held that the State must prove its case by "clear and convincing evidence." *Verniero, supra* at 1111. There the fact finder was required to make a determination concerning an accused's future dangerousness; a task which the circuit court characterized as "an undertaking involving substantial uncertainty." *Id.* at 1108. Here the fact finder is required to make a similar, complex determination; one that is nearly identical to that made by the civil court in *Kansas v. Hendricks, supra,* which was required to determine whether an offender had a "mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." In upholding the statute in *Hendricks,* this Court noted that the Kansas Legislature had "provided strict procedural safeguards," including placing the burden upon

the state to prove its case beyond a reasonable doubt. *Hendricks, supra* at 368-69, 117 S.Ct. at 2085. In light of *Specht* and *Verniero,* the Pennsylvania court properly rejected the Petitioner's suggestion that the burden of proof in any such proceeding could be shifted and placed upon the defendant.

Finally, contrary to the Petitioner's assertion, the Pennsylvania Supreme Court did acknowledge the "strong presumption that legislative enactments do not violate the constitution." *Contrast* Petition for Writ of Certiorari, at 7, *with Williams,* 733 A.2d at 603. It carefully examined the Pennsylvania "Megan's Law" statute, which is unique among the fifty states. Having done so, the Pennsylvania court correctly decided that the procedure contained in the Registration of Sexual Offenders Act violates the Due Process Clause of the Fourteenth Amendment. This Court should not grant certiorari to review a decision that is consistent with its long established case law.

CONCLUSION

For the reasons stated above, respondent respectfully requests that a writ of certiorari to review the decision below be denied.

Respectfully submitted,

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